

Call for a National Plan of Action for Racial Justice

An action plan is needed for the full implementation of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD)

Introduction

This year, the United States celebrates the 50th anniversary of the historic March on Washington along with the progress that the nation has made since. The laws that the civil rights movement brought about, such as the Civil Rights Act of 1964, have addressed many direct forms of discrimination. More recently, the Obama Administration has reinvigorated the civil rights enforcement units within each federal agency and the Department of Justice.

However, the commemoration of the March on Washington is also a poignant reminder of the work that remains to be done to advance true racial equality and human rights for all. Civil rights laws and agencies have not effectively addressed the structural racism that produces large disparities in how groups experience the justice system, schools, hospitals, and social services.¹ In addition, recent court decisions have undermined some important aspects of civil rights legislation.²

International human rights norms and standards remain an underused resource in the struggle for racial justice and human rights, despite the fact that the United States has ratified the landmark International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).³ In an effort to strengthen U.S. implementation of this treaty, the US Human Rights Network and the Human Rights at Home (HuRAH) Campaign calls on the Obama Administration to create a National Plan of Action that will help the government fulfill its obligations.

This document explains why the treaty is important, why a Plan of Action is necessary, and what the components of a plan should be. A template for the plan is also attached. The document is intended to inform social justice groups from the grassroots to the national level, while conveying to government officials the need for a plan and how it might look.

¹ See US Human Rights Network, "Structural Racism in the United States: A Report to the U.N. Committee for the Elimination of Racial Discrimination," February 2008, available at www.ushrnetwork.org/sites/default/files/cerd2008structuralracism.pdf

² For example, see *Alexander v. Sandoval*, 532 U.S. 275 (2001).

³ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966). 660 U.N.T.S. 195, entered into force Jan. 4, 1969. The United States has also ratified the International Covenant on Civil and Political Rights, which includes protections based on race and ethnicity.

This effort is central to the mission of the US Human Rights Network, a national network of organizations and individuals working to build and strengthen a people-centered human rights movement in the United States. The Network builds collective power, awareness and capacity among domestic social justice groups in order to strengthen a human rights culture and hold the government accountable to universally accepted standards and norms. The Human Rights at Home Campaign (HuRAH Campaign) similarly focuses on creating and strengthening accountability mechanisms for all levels of government to comply with human rights obligations.⁴

What is the Process for Creating a Plan of Action?

We call on President Obama to adopt a National Plan of Action to fully implement the International Convention on the Elimination of all forms of Racial Discrimination as one of its top priorities.

The Plan of Action should be completed rapidly enough to be used for the bulk of the Obama Administration's second term. At the same time, the process should be fully participatory. Public hearings, whether by region or social sector or a combination, as well as other structures, should allow social justice organizations and other members of civil society to contribute substantively to the setting of goals, targets, and other core components of the plan.⁵

What is CERD, and how does it differ from U.S. law?

In 1965, the UN adopted the broad human rights treaty known as the International Convention on the Elimination of All Forms of Racial Discrimination (often referred to as CERD or ICERD, herein referred to as "the Convention"). When the treaty entered into force in 1969, a Committee for the Elimination of Racial Discrimination ("the Committee") was created to review implementation, interpret the treaty, and consider complaints.

The United States signed the treaty in 1966, although the Senate did not ratify it until 1994. One of only three primary international human rights treaties the United States has ratified, ICERD is legally binding on all levels of government under the Supremacy Clause of the Constitution.⁶

The Committee reviewed the United States in 2001 and 2008 and is scheduled to do so again in 2014. In the 2008 review, the Committee found wide racial disparities despite

⁴ The US Human Rights Network, American Civil Liberties Union, Rights Working Group, Border Network for Human Rights, National Law Center on Homelessness and Poverty, and Human Rights Institute at Columbia Law School serve on the HuRAH Steering Committee. The National Economic and Social Rights Initiative currently chairs the HuRAH Campaign. See <http://www.ushrnetwork.org/our-work/campaign/human-rights-home-campaign>

⁵ The creation of the National HIV/AIDS Strategy Federal Implementation Plan provides a useful model for an effective and participatory process.

⁶ The Supremacy Clause (Article VI, Section 1, Clause 2) of the U.S. Constitution states the "Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

the civil rights protections in place and suggested concrete ways the United States could improve its record in areas such as housing, education, and health.⁷

Because the Constitution protects against racial discrimination and the United States has enacted many civil rights laws and policies, officials often assume that the country is already in full compliance with ICERD. However, this is not the case, as the treaty is broader than U.S. law in several ways. Supreme Court decisions have also narrowed civil rights protections, making the treaty an even more important anti-discrimination tool. Differences between the Convention and domestic civil rights statutes include the following:

- **The treaty applies to government at *all levels***, while many civil rights statutes prohibit discrimination only by federal agencies and those state and local government programs receiving federal funds.⁸
- **The treaty prohibits policies and practices that have a discriminatory impact** on people of color, even where there is no intent to discriminate. U.S. laws cover such indirect or unintended discrimination in only a few areas (such as voting, employment, housing, and programs receiving federal financial assistance), and even in some of these areas Supreme Court decisions have made it harder for private individuals to pursue claims in court.⁹ When the United States ratified the Convention in 1994, individuals could sue in federal court to obtain a remedy against discriminatory government policies that were not necessarily intentional. However, in 2001 the Supreme Court interpreted the key federal civil rights enforcement statute, Title VI of the Civil Rights Act of 1964, as precluding claims of racially disparate impact without an intent to discriminate.¹⁰ These limitations prevent the United States from meeting its obligations under the Convention by addressing the structural discrimination that leads to disparities in incarceration, education, housing foreclosures, and other areas that profoundly influence a population's enjoyment of their human rights.¹¹
- Countries that have ratified the Convention are obligated not just to avoid policies with a discriminatory impact, but **to affirmatively take action** to address racial disparities. This means the United States is obligated to take steps to redress past racial discrimination and continuing racial disparities.¹²

⁷ Committee for the Elimination of Racial Discrimination, Concluding Observations: United States of America, CERD/C/USA/CO/6, February 2008. See also the shadow reports prepared by social justice organizations at <http://www.ushrnetwork.org/news-updates/cerd-newsletter-one-2008-cerd-shadow-reports-compilation>.

⁸ See, e.g., Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.

⁹ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

¹⁰ *Alexander v. Sandoval*, 532 U.S. 275 (2001). This decision has undermined the Convention's requirement of judicial enforceability. Article 6 requires that each participating state afford: "(1) effective protection and remedies, through competent tribunals, and (2) the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

¹¹ The Committee's 2008 Concluding Observations specifically urge the United States to address this gap: "The Committee recommends the State party to review the definition of racial discrimination used in the federal and state legislation and in court practice, so as to ensure ... that it prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect."

¹² This obligation is especially important after a divided Supreme Court ruled on voluntary use of race in student assignment at the K-12 level and in student admissions to postsecondary institutions. See *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). See also *Grutter v. Bollinger*, 539 U.S. 306 (2003), which upheld the University of Michigan Law School's affirmative action admissions policy. The Obama administration recently clarified the holdings in both these cases to permit the use of race to reduce racial isolation

- Going beyond the single-issue approach of many anti-discrimination laws, **the Committee recognizes cases of multiple, or intersecting, discrimination**, where a protected identity or status, such as gender, religion, immigration status, sexual identity, or age, exists in combination with race.

Why Is a National Plan of Action Necessary?

The treaty has another positive feature: it encourages new mechanisms for addressing racial discrimination at the national level. The Committee has recommended that each country create a National Plan of Action to implement CERD, as well as a central agency or commission to educate the public and monitor treaty compliance. The United States has been specifically urged to create a plan, and has committed to doing so:

- When the Committee considered the United States in 2008, it raised concerns about persistent racial disparities in the criminal justice system and called for “implementation of national strategies or plans of actions aimed at the elimination of structural racism.”¹³
- UN experts, such as the Special Rapporteur on Racism and the Working Group on People of African Descent, have called on the United States to adopt a national plan of action.
- When another UN mechanism, the Universal Periodic Review, considered the U.S. human rights record, the Obama Administration agreed to a recommendation to adopt “a comprehensive national work-plan to combat racial discrimination.”¹⁴

A plan would set concrete targets, create new tools for accountability, and improve coordination between agencies and levels of government on racial discrimination issues that extend beyond current civil rights law. While primarily focused on the federal government, a plan should encourage all levels of government and other stakeholders to act. Most importantly, a plan would establish clear steps to advancing racial equality.

What are the Components of a National Plan of Action?

1. Vision

Although the National Plan of Action should focus on what can be accomplished in the next few years, such as through 2016, it should be a living document with a broader vision that guides both short- and long-term goals, starting with the Concluding

and to promote diversity. See the December 2011 Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools issued by the Department of Justice Civil Rights Division and the Department of Education Office for Civil Rights. However, these issues continue to be challenged in the federal courts. See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), in which a white applicant challenged the university’s affirmative action policy. The matter was argued before the Supreme Court in October 2012 and a decision is pending.

¹³ Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, CERD/C/USA/CO/6, February 2008.

¹⁴ Recommendation #92.111 made by the government of Qatar: “Adopt a comprehensive national work-plan to combat racial discrimination.” Canada, Australia, Brazil, and other countries have adopted national action plans to address racial discrimination.

Observations.¹⁵ The vision should be based on the Convention and developed through a participatory process that includes a broad range of civil society. It should include the elimination of racial discrimination in all its forms and manifestations, as demonstrated by the end of race disparities across the full range of human rights.

2. Specific goals and targets

In order for the plan to be a useful tool for planning, implementation, and monitoring, the goals should be ambitious and comprehensive, and must include concrete targets, with timelines and responsibilities clearly assigned to agencies or individuals.¹⁶

There are several ways of conceiving the goals. Canada has a six-point action plan on racism divided into areas, such as strengthening civil society, assisting vulnerable groups, and countering bias.¹⁷ It would also be possible to set goals according to each sector in which racial discrimination plays a role, most of which correspond to obligations laid out in the Convention's articles. These include, but are not limited to:

- criminal justice
- education
- elections
- employment
- environment
- health
- poverty
- housing
- immigration
- land and property¹⁸

3. Actions, timelines, and implementing agencies

To comply with the Convention, most goals will require action in five key areas:

- Existing laws, policies, and programs are reviewed, amended or rescinded to end disparities and to respect, protect, and fulfill the human rights of all.
- New laws, policies, and programs are created to eliminate disparities, providing *positive measures* where needed.
- Equitable, adequate allocation of resources, encourages equality, and addresses the impacts of past discrimination.
- Accurate, timely, and disaggregated data is collected and made available to identify and correct discrimination.
- Relevant officials in all agencies and levels of government, as well as affected communities, are trained in the obligations under the Convention.

¹⁵ Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, CERD/C/USA/CO/6, February 2008.

¹⁶ For a good example of such a plan from the Obama Administration, see *National HIV/AIDS Strategy Federal Implementation Plan*, February 2010 (updated in July 2012).

¹⁷ *A Canada for All: Canada's Action Plan Against Racism*, 2005.

¹⁸ In many cases the effects of discrimination cut across sectors. For example, there is a strong link between health disparities and segregation, due to a lack of resources and increased environmental health risks in marginalized neighborhoods. Similarly, disparate treatment by the criminal justice system leads to a disproportionate loss of voting rights in certain states.

Private actors

While the government itself must not discriminate, it must also protect persons from discrimination by private persons and entities. The Committee has stated, “to the extent that private institutions influence the exercise of rights or the availability of opportunities,” governments “must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.”¹⁹ Such protection might include consistent enforcement of laws through timely investigation, fines, and prosecution.²⁰

Multiple and intersecting discrimination

Finally, all goals and corresponding actions should address multiple forms of discrimination, and especially gender. The Committee has found that some forms of racial discrimination have a *unique* and *specific* impact on women, as women and men do not experience discrimination equally or in the same ways.²¹ For example:

- Women of color experience environmental emergencies in distinct ways. Women die at a higher rate and are vulnerable to sexual attacks during emergencies. During recovery, they experience increased domestic violence, as well as the stress of assuming a caretaking role within families and communities in crisis.²²
- Immigrant women of color suffer disproportionately from anti-immigrant policies, which can increase their vulnerabilities to domestic abuse through denial of access to shelters and services, social assistance, housing, and health benefits.

As described above and in the attached template, the Plan of Action should specify precise goals for eliminating disparities in particular sectors, such as education, voting, and criminal justice. The recommendations of the Committee should be particular priorities. For each goal, the Plan should lay out specific activities, timelines, and agencies responsible in the following five areas of activity.

¹⁹ General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms (Art. 5), March 15, 1996.

²⁰ The United States ratified the Convention with the reservation that it would not regulate private conduct beyond what is required under domestic law: “To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures . . . with respect to private conduct except as mandated by the Constitution and laws of the United States.”

²¹ Special Recommendation No. 25 of the Committee for the Elimination of Racial Discrimination states, “Certain forms of racial discrimination may be directed towards women specifically because of their gender. . . . Women may also be further hindered by a lack of access to remedies and complaint mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in private spheres of life.”

²² Jacqui Patterson, “Natural Disasters, Climate Change Uproot Women of Color,” www.ontheissuesmagazine.com/2009fall/2009fall_patterson.php

REVIEW AND IMPROVE EXISTING LAWS, POLICIES, AND PROGRAMS

“Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”

CERD, Article 2

The Obama Administration should review all laws, policies, and programs that may contribute to racial discrimination directly or indirectly. Not all of these laws may explicitly mention race or discrimination. Some laws that appear to be racially neutral in fact produce a disparate impact, regardless of their intent.

One well-known example is the inequitable sentences meted out for crack and powder cocaine, a disparity that has been reduced but not eliminated.²³ In another example of a law that doesn't explicitly mention race, under the H-2B visa program for skilled, non-agricultural workers, employees lose their immigration status if they quit or change jobs. As a result, many exploited workers of color are forced to remain in abusive work environments where they are imprisoned and threatened.²⁴

Some existing legislation should be more widely adopted. For example, black heirs are disproportionately separated from property through court-ordered sales after multiple people inherit the property. The Uniform Partition of Heirs Property Act, endorsed by the American Bar Association and adopted in Nevada and Georgia, protects against predatory speculators, helping heirs to maintain ownership when possible or protecting owners from losing substantial wealth upon sale.²⁵

INTRODUCE NEW LAWS, POLICIES, AND PROGRAMS, INCLUDING SPECIAL MEASURES

The comprehensive review should also identify what new laws, policies, and programs are needed, particularly where treaty obligations extend beyond domestic law. New laws and policies should:

- *address structural racism*, including through *affirmative measures* to correct inequities. The Committee has repeatedly recommended that the United States implement *special or affirmative measures* to eliminate current racial disparities in the enjoyment of human rights.²⁶

²³ In 2010 President Obama signed into law the Fair Sentencing Act of 2010, which included provisions that reduced the disparity in the amount of crack cocaine and powder cocaine subject to certain federal criminal penalties from a weight ratio of 100:1 to one of 18:1. The law also eliminated the five-year mandatory minimum sentence for simple possession of crack cocaine. The change did not completely eliminate the disparity, affect state laws, or apply to those already sentenced. See Families Against Mandatory Minimums, “Frequently Asked Questions: The Fair Sentencing Act of 2010,” at <http://www.famm.org/Repository/Files/082810%20FINAL%20BASICS%20FAQ.pdf>

²⁴ US Human Rights Network Labor Caucus, “Labor and Employment Rights Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination,” February 2008.

²⁵ For more information on the Uniform Partition of Heirs Property Act, see Uniform Law Commission www.uniformlaws.org/Act.aspx?title=Partition%20of%20Heirs%20Property%20Act

²⁶ Committee for the Elimination of Racial Discrimination, Concluding Observations: United States of America, CERD/C/USA/CO/6, February 2008, para. 15. See also Committee for the Elimination of Racial Discrimination, General Recommendation 32.

- allow people with *multiple and intersecting identities* to bring claims under those identities rather than having to choose one or the other.
- provide *urgent measures* where needed. As one example of urgent measures considered under the Convention, the Committee considered the situation of the Western Shoshone under its early warning and urgent action procedure. The Western Shoshone face threats to their ancestral land, health, and cultural rights due to nuclear testing, toxic waste, mining and logging in areas of spiritual and cultural significance. The Committee concluded “these issues warrant immediate and effective action” and called for a freeze on exploitation of the land and for a dialogue between Federal and Tribal governments.²⁷
- address gaps in implementation already covered under existing law. For example, the Department of Treasury still has no anti-discrimination regulations as required by Title VI of the Civil Rights Act of 1964.

REVIEW AND CORRECT RESOURCE ALLOCATION

Adequate, and in some cases additional, resources are essential to ensure that laws, policies, programs, and practices are effective and accessible to vulnerable populations of color. Government agencies should undertake regular budget reviews for unfair allocations, while the Administration’s budget should ensure adequate resources for both enforcement mechanisms and affirmative measures to address the impact of past and present discrimination.

As with laws and policies, budget decisions that appear race-neutral may produce a disparate impact. For example, people of color are more likely to rely on government-funded health services, and are therefore disproportionately impacted by federal and state policies that reduce public funding for sexual and reproductive health care.

IMPROVE DATA COLLECTION AND AVAILABILITY

Implementing the Convention will require the timely availability of public documents and statistics that can:

- help identify discriminatory effects and troublesome patterns;
- ensure that resources are available to the most vulnerable populations;
- help communities advocate for equal access; and
- allow the public to monitor compliance with the treaty and the action plan.

In one example of the importance of data, a young public defender returning from a funeral with family members was stopped by Maryland State Police.²⁸ The officers made the family stand in the rain while police dogs searched their vehicle for drugs. The

²⁷ Committee for the Elimination of Racial Discrimination, Early Warning and Urgent Action Procedure, Decision 1 (68), Western Shoshone Nation, United States of America, CERD/C/USA/DEC/1, April 11, 2006, at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/25eeac288211bee9c1257181002a3cfb/\\$FILE/G0641251.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/25eeac288211bee9c1257181002a3cfb/$FILE/G0641251.pdf)

²⁸ See "Driving While Black" in Maryland: ACLU Lawsuits Against the Maryland State Police, February 2, 2010, www.aclu.org/racial-justice/driving-while-black-maryland. See also the 2008 settlement agreement at http://www.aclu.org/files/pdfs/racialjustice/mdnaacp_v_mdstatepolice.pdf

attorney brought a civil rights action against the police, resulting in two landmark settlements requiring data collection and publication of all highway drug and weapons searches, analyzed by race, search justification, and outcome. The data revealed a pattern of racial profiling: black drivers made up only 17% of all drivers on the interstate, but accounted for 70-75% of all police searches.

Such data is important for identifying discrimination in housing (lending and foreclosures, as well as segregation through assisted housing programs), education (punitive school discipline and outcomes), criminal justice (sentencing, convictions, and capital punishment), voter disenfranchisement, and other areas. It is essential to identify not just race, but also where race combines with age, sex, immigration status, sexual identity, and other categories, as forms of multiple and intersecting discrimination can easily be overlooked.

While the government already collects some of this data, the Plan of Action should provide for comprehensive, consistent, and transparent data collection and for a central mechanism to compile the information and make it publically available.

REQUIRE EDUCATION AND TRAINING OF OFFICIALS AND COMMUNITIES ABOUT CERD

Except for State Department officials who work with the United Nations, few government workers are familiar with the Convention. Despite commitments to the Committee, the U.S. government has not provided the necessary training programs. In 2008 Human Rights Watch contacted the attorneys general of all 50 states, and found that “not one has responded affirmatively that it was aware of the treaty’s existence or of state responsibilities under it.”²⁹

The Administration should provide mandatory education and training to government officials working in fields with the potential for direct or indirect discrimination. For example, the Committee recommends that law enforcement “receive intensive training to ensure that in the performance of their duties they respect as well as protect human dignity and maintain and uphold the human rights of all persons without distinction as to race, color or national or ethnic origin.”³⁰

Working with civil society and social justice organizations, the government should also support human rights education and other training to communities to foster awareness of their rights and encourage the participation and empowerment of minorities.

4. Coordination

The Committee has expressed concern over “the lack of appropriate and effective mechanisms to ensure a coordinated approach towards the implementation of the

²⁹ Human Rights Watch, “Submission to the Committee on the Elimination of Racial Discrimination,” February 2008, available at <http://www.hrw.org/reports/2008/us0208/us0208web.pdf>

³⁰ Committee for the Elimination of Racial Discrimination, General Recommendation No. 13: Training of law enforcement officials in the protection of human rights: March 21, 1993.

Treaty at the federal, state, local and tribal levels.”³¹ The Plan of Action should plan, implement, and monitor well-coordinated actions 1) among government agencies; 2) among local, tribal, state, and federal governments; and 3) with civil society.

Poor coordination among government agencies causes disruptions in the access to basic human rights and increased vulnerability of persons with a right to protection. For example, the Department of Justice released a report encouraging communities to prevent the cycling of the homeless through the justice system, while at the same time providing a grant to local law enforcement in Florida to support “enforcement of quality of life violations.”³² Reducing disparities in education will similarly require coordination of national initiatives such new legislation banning or providing alternatives to forms of punitive school discipline policies, as well as disciplinary policies and resource equity at the level of the district or even the school.

5. Accountability mechanisms

Effective implementation of the Convention will require a permanent mechanism to monitor compliance, educate officials and the public, and ensure that federal, state, and local authorities are meeting their treaty commitments. The Committee has recommended that parties to the treaty create a central agency or commission for this purpose. In the United States this mechanism could take the form of a new body, or the expansion of an existing body like the Commission on Civil Rights to a Commission on Civil and Human Rights.

The mechanism should regularly review all the Convention’s obligations, and especially the recommendations to and commitments by the US government before the Committee in 2001, 2008, and 2014, as well as any other goals, targets, and timeframes established in the Plan of Action. The government’s performance should also become public through comprehensive public reports and hearings.

This primer and template was produced by the CERD Taskforce of the US Human Rights Network and the Human Rights at Home (HuRAH) Campaign. Taskforce members include: US Human Rights Network (co-chair); Lawyers’ Committee for Civil Rights Under Law (co-chair); ACLU; Poverty and Race Research Action Council; and the Leadership Conference on Civil and Human Rights. A broad range of groups and individuals were also consulted in developing the documents. Interviews were conducted by Kaleema Haidera Al-Nur, Esq. The primer and template was drafted by Matt Easton.

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³¹ Committee for the Elimination of Racial Discrimination, Concluding Observations: United States of America, CERD/C/USA/CO/6, February 2008, para. 13.

³² Constructive Alternatives to Criminalization, The Justice Blog, United States Department of Justice, <http://blogs.justice.gov/main/archives/2221>